# Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01–29–04 OF 2015(Q), 01–28–04 OF 2015(Q), 01–38–04 OF 2015(Q), 01–39–06 OF 2015(Q) AND 01–43–06 OF 2015(Q)
ARIFIN ZAKARIA CHIEF JUSTICE, HASAN LAH, ABU SAMAH NORDIN, AZAHAR MOHAMED AND BALIA YUSOF FCJJ
15 MARCH 2017

*Land Law — Customary land — Native customary rights ('NCR') — Respondents sued appellants for encroaching onto and carrying out activities on land to which they claimed NCR — Whether respondents had in fact abandoned the claimed NCR lands or their NCR rights to those lands — Whether respondents in own pleadings admitted they left claimed NCR lands very many years ago to resettle elsewhere — Whether fact of abandonment undisputed — Whether respondents' action against appellants barred under the Public Authorities Protection Act 1948 and also by laches — Whether High Court rightly allowed striking out of respondents' action under O14A of Rules of the High Court 1980*

The respondents in the five appeals herein, acting on their own behalf as well as on behalf of the Kelabit, Penan and Lun Bawang natives of Sarawak, sued all the six appellants in the High Court for various declaratory orders and damages on the ground their native customary rights ('NCR') to certain lands (as depicted on a map annexed to their statement of claim) had been encroached upon. The respondents claimed that following the grant by the Director of Forests Sarawak, of timber licences and licences to plant forests to the four appellant companies herein, the latter had trespassed onto lands over which the respondents had acquired NCR from time immemorial to cut down and harvest timber and to maintain planted forests for merchantable timbers. All the appellants applied to strike out the respondents' action pursuant to O 14A and/or O 18 r 19 of the Rules of the High Court 1980 on the grounds: (a) the respondents should not have filed a writ action but a judicial review application instead (this ground was abandoned during the appeal to the Court of Appeal ('the COA')); and (b) the respondents' claim was barred by the Limitation Ordinance and the Public Authorities Protection Act 1948 ('the PAPA'). The respondents did not file any affidavit in reply to the appellants' applications taking the view that the issues raised were purely of law and not of facts. The High Court allowed all the striking out applications ruling, inter alia, that the respondents should have filed a judicial review application and not a writ action. From the respondent's statement of claim, the High Court found as an admission of fact that since the 1960s and 1970s the respondents had migrated and resettled at Long Napir and Kampung Bahagia in Limbang and were no

longer residing in nor in possession of the lands to which they were claiming NCR and, consequently, that the respondents had abandoned the claimed NCR lands or their NCR rights to those lands. Vis a vis the Director of Forests Sarawak, the High Court found that the respondents' action was barred by limitation under s 2(a) of the PAPA as they were challenging, by an action filed in 2011, the issuance of licences to the appellant companies as far back as 1985, 2002 and 2004. Vis a vis the appellant companies, the High Court noted that despite having either actual or presumed knowledge that those companies had been carrying on their logging or tree planting activities on the claimed lands for very many years — in one case, for more than 26 years — the respondents, if they were truly aggrieved that their NCR rights had been tampered with, should have taken prompt action to stop those activities from carrying on, but they never did. The COA allowed the respondents' appeal and remitted the case back to the High Court for re-hearing as a writ action holding that there were issues of fact and law that required a trial including the issue of limitation. The appellants were granted leave to appeal to the Federal Court against the COA's decision.

**Held,** allowing the appeals, setting aside the decision of the Court of Appeal and affirming the High Court's decision to strike out the respondents' action:

(1) The respondents had clearly lost their rights to the claimed NCR land when the same was abandoned by their resettlement to other areas away from the claimed areas. There was no evidence to suggest they were still in continuous possession or occupation of the claimed land or to suggest they had ever returned to the land after their resettlement and migration. On the facts, the respondents no longer possessed, planted or maintained their NCR lands in their previous settlements where logging activities by the appellants had been carried out for about 20 years before the commencement of the suit against the appellants. It was inconceivable that the respondents would not have known of the presence of the appellants and their logging activities on the land for over a period of 26 years had they been in occupation of the land. The uncontradicted evidence was inconsistent with 'occupation' (see paras 68 & 81–82).

(2) Upon perusal of the pleadings, the High Court found as a fact that the respondents had left their ancestral lands, had resettled elsewhere and were no longer residing in or in possession of the claimed NCR lands. The High Court found as a fact that the Kelabit and Penan plaintiffs were now residing at Long Napir and Kampung Bahagia, Limbang, and had resided there since the 1960s and 1970s, while the Lun Bawang plaintiffs had migrated from their former settlements during the Japanese occupation in the Second World War. This was clearly evident from paras 1(b) and (c) of the statement of claim. Paragraphs 9, 10 and 11 of the statement of claim reiterated the respondents' averment of the facts about their resettlement and abandonment of their NCR lands. There

was no assertion that they were still in occupation or possession of their original NCR lands. These were the respondents' own averments and the appellants never disputed it. In the court's view, this was an undisputed fact. The respondents never challenged this finding of fact by the High Court when they appealed against its decision to the Court of Appeal (see paras 45, 47–48 & 50).

(3) Although abandonment by the respondents of the claimed NCR land was never stated in the appellants' affidavits in support of their O 14A applications, there were sufficient material facts before the High Court from the pleadings that supported the court's finding that there was abandonment by the respondents of their NCR lands. That finding was not erroneous and was never challenged. This court agreed that there was 'non-user' and abandonment by the respondents of their native land. No evidence was adduced and neither was it pleaded that according to their customs, their rights to untitled land in their previous settlements continued to subsist notwithstanding the fact they had been resettled in their present villages nearly 40 years prior to the filing of the suit against the appellants (see paras 79–80).

(4) The Court of Appeal erred in holding that there were disputed material facts and/or insufficient facts that could justify the High Court in concluding as it did. An appellate court should always be slow to disturb the findings of fact made by a trial judge, more so where such findings of fact were never challenged by the parties. Further, it was not demonstrated in what way the High Court had erred in coming to its finding that merited appellate intervention. The undisputed facts found by the High Court as disclosed from the pleadings had to be upheld (see paras 85–86).

**[Bahasa Malaysia summary**

Pihak responden dalam lima rayuan ini, bertindak untuk diri mereka sendiri dan juga bagi pihak Kelabit, Penan dan Lun Bawang anak negeri di Sarawak, menyaman semua keenam-enam perayu di Mahkamah Tinggi untuk pelbagai perintah pengisytiharan dan ganti rugi atas alasan hak adat anak negeri mereka ('hak adat') bagi tanah tertentu (sebagaimana yang digambarkan atas peta yang dilampirkan bersama-sama penyata tuntutan) telah diceroboh. Pihak responden menyatakan bahawa menurut kelulusan oleh Pengarah Perhutanan Sarawak, berkenaan dengan lesen pembalakan dan lesen untuk menanam pokok hutan kepada empat syarikat perayu, pihak perayu telah mencerobohi tanah yang pihak responden telah memperoleh hak adat anak negeri sejak sekian lama untuk menebang dan menanam balak dan untuk menyenggara penanaman pokok hutan bagi maksud pembalakan boleh dagang. Kesemua perayu telah memohon untuk membatalkan tindakan responden menurut A 14A dan/atau A 18 k 19 Kaedah-Kaedah Mahkamah Tinggit 1980 atas alasan: (a) pihak responden tidak sepatutnya memfailkan writ saman tetapi

sebaliknya suatu semakan kehakiman patut dibuat (alasan ini telah diabaikan semasa rayuan di Mahkamah Rayuan ('MR'); dan (b) tuntutan pihak responden telah dihalang oleh Ordinan Had Masa dan Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'). Pihak responden tidak memfailkan apa-apa afidavit balasan kepada permohonan perayu yang menyatakan bahawa isu yang dibangkitkan adalah semata-mata bersifat perundangan dan bukan fakta. Mahkamah Tinggi membenarkan kesemua permohonan pembatalan itu, antara lain, menyatakan bahawa pihak responden sepatutnya memfailkan suatu permohonan semakan kehakiman dan bukan suatu writ tindakan. Daripada penyata tuntutan responden, pihak Mahkamah Tinggi mendapati suatu pengakuan fakta memandangkan sejak 1960 dan 1970, pihak responden telah berpindah dan menetap semula di Long Napir dan Kampung Bahagia di Limbang dan tidak lagi tinggal atau memiliki tanah-tanah yang mereka tuntut sebagai hak adat anak negeri dan, selanjutnya, pihak responden telah mengabaikan tanah hak adat anak negeri yang dituntut atau hak adat anak negeri mereka ke atas tanah-tanah itu. Berbanding dengan Pengarah Perhutanan Sarawak, Mahkamah Tinggi mendapati bahawa tindakan responden telah dihalang oleh had masa di bawah s 2(a) APPBA kerana mereka mencabar, melalui suatu tindakan pada tahun 2011, pengeluaran lesen kepada syarikat perayu sehingga ke tahun 1985, 2002 dan 2004. Berbanding dengan syarikat perayu, Mahkamah Tinggi mendapati bahawa walaupun hanya mempunyai pengetahuan sebenar atau sangkaan bahawa syarikat itu telah menjalankan pembalakan atau aktiviti penanaman pokok di atas tanah yang dituntut itu untuk beberapa tahun lamanya — dalam satu kes, lebih daripada 26 tahun — pihak responden, jika benar-benar terkesan bahawa hak adat anak negeri mereka telah dicerobohi, mereka sepatutnya telah mengambil tindakan segera bagi memberhentikan aktiviti itu daripada diteruskan, tetapi tidak. MR membenarkan rayuan responden dan merujuk kembali kes tersebut kepada Mahkamah Tinggi untuk pendengaran semula sebagi suatu writ tindakan dengan menyatakan bahawa terdapat isu fakta dan undang-undang yang memerlukan suatu perbicaraan termasuklah tentang isu had masa. Pihak perayu diberikan kebenaran untuk merayu ke Mahkamah Persekutuan terhadap keputusan MR itu.

**Diputuskan,** membenarkan rayuan, mengenepikan keputusan MR dan membenarkan keputusan Mahkamah Tinggi untuk mengenepikan tuntutan responden:

(1) Pihak responden telah dengan jelasnya hilang hak untuk menuntut tanah hak adat anak negeri apabila mereka mengabaikan tanah itu dengan menetap semula ke tempat lain jauh dari kawasan yang dituntut. Tidak terdapat apa-apa keterangan yang menunjukkan bahawa mereka masih terus memiliki atau menduduki tanah yang dituntut atau yang menunjukkan bahawa mereka ada kembali semula ke tanah itu selepas mereka menetap semula dan berpindah. Atas fakta ini, pihak responden

tidak lagi memiliki, menanam atau menyenggara tanah hak adat anak negeri dalam penempatan lama mereka yang aktiviti pembalakan oleh perayu telah dijalankan selama 20 tahun sebelum saman terhadap perayu dimulakan. Adalah mustahil responden tidak tahu tentang kehadiran perayu dan aktiviti pembalakan mereka untuk tempoh selama 26 tahun sekiranya mereka menduduki tanah itu. Keterangan yang tidak bercanggah ini adalah tidak konsisten dengan 'kependudukan' (lihat perenggan 68 & 81–82).

(2) Setelah menyemak pliding, Mahkamah Tinggi mendapati bahawa adalah merupakan suatu fakta bahawa responden telah meninggalkan tanah nenek moyang mereka, telah menetap di tempat lain dan tidak lagi menetap atau memiliki tanah hak adat anak negeri yang dituntut itu. Mahkamah Tinggi juga mendapati bahawa adalah merupakan suatu fakta bahawa pihak plaintif dari suku Kelabit dan Penan telah sekarang menetap di Long Napir dan Kampung Bahagia, Limbang, dan telah menetap di situ sejak tahun 1960 dan 1970, manakala suku Lun Bawang pula telah berpindah daripada penempatan lama mereka semasa penaklukan Jepun dalam Perang Dunia Kedua. Ini adalah jelas dinyatakan dalam perenggan 1(b) dan (c) penyata tuntutan. Perenggan 9, 10 dan 11 penyata tuntutan menegaskan tentang fakta bahawa pihak responden telah menetap semula dan mengabaikan tanah hak adat anak negeri. Tidak terdapat keterangan bahawa mereka masih menetap atau memiliki tanah hak adat anak negeri yang asal. Ini merupakan hujahan pihak responden dan pihak perayu tidak pernah menafikannya. Pada pandangan mahkamah, ini merupakan fakta yang tidak dinafikan. Pihak responden tidak pernah mencabar dapatan fakta oleh Mahkamah Tinggi semasa mereka merayu terhadap keputusannya di MR (lihat perenggan 45, 47–48 & 50).

(3) Walaupun pengabaian oleh responden ke atas tanah hak adat anak negeri yang dituntut itu tidak pernah dinyatakan dalam afidavit sokongan perayu bagi permohonan A 14A, terdapat fakta material yang mencukupi di hadapan Mahkamah Tinggi dalam pliding yang menyokong dapatan mahkamah bahawa terdapat pengabaian oleh responden tentang tanah hak adat anak negeri mereka. Dapatan itu tidak terkhilaf dan tidak pernah dicabar. Mahkamah ini bersetuju bahawa terdapat 'ketidakgunaan' dan pengabaian oleh responden ke atas tanak anak negeri mereka. Tiada keterangan yang dikemukakan dan tidak pula ia diplidkan bahawa menurut adat mereka, hak mereka ke atas tanah dalam penempatan mereka sebelum ini berterusan dan berkekalan walau apa pun fakta yang menyatakan mereka telah ditempatkan semula dalam perkampungan sekarang hampir 40 tahun sebelum pemfailan saman terhadap perayu (lihat perenggan 79–80).

(4) MR telah terkhilaf apabila memutuskan bahawa terdapat fakta material

yang dicabar dan/atau fakta yang tidak mencukupi yang boleh mengesahkan Mahkamah Tinggi untuk berbuat demikian. Suatu mahkamah rayuan hendaklah tidak mengusik dapatan fakta yang dibuat oleh seorang hakim bicara, lebih-lebih lagi sekiranya dapatan fakta itu tidak pernah dicabar oleh pihak-pihak. Selanjutnya, ia tidak pernah ditunjukkan dalam apa-apa pun bahawa Mahkamah Tinggi telah terkhilaf dalam membuat dapatan yang membolehkan campur tangan di peringkat rayuan. Fakta yang tidak dicabar yang didapati oleh Mahkamah Tinggi sebagaimana yang ditunjukkan dalam pliding hendaklah dikekalkan (lihat perenggan 85–86).]

**Notes**

For cases on native customary rights, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3473–3474.

**Cases referred to**

*Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, HC (refd)

*Bisi Ak Jinggot @ Hilarion Bisi Ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] MLJU 670; [2013] 6 CLJ 805, FC (refd)

*Director of Forests, Sarawak & Anor v Balare Jabu & Ors and another appeal* [2012] MLJU 1758; [2012] 7 CLJ 685, FC (refd)

*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812, CA (refd)

*Keteng bin Haji Li v Tua Kampong Suhaili* [1951] SCR 9 (refd)

*Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794; [2014] 1 CLJ 880, CA (refd)

*Nyalong v The Superintendent of Lands & Surveys 2nd Division, Simanggang* [1967] 2 MLJ 249 (refd)

*Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, CA (refd)

*Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543, HC (refd)

*Sapiah binti Mahmud (F) v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors* [2009] MLJU 410; [2009] 9 CLJ 567, HC (refd)

*Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (distd)

*Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

*Udin anak Lampon v Tuai Rumah Usom* [1949] SCR 3 (refd)

*Watson and anor v Dutton Forshaw Motor Group Ltd and ors* [1998] Lexis Citation 4282; [1998] EWCA 3245, CA (refd)

**Legislation referred to**

Civil Law Act 1956 ss 3(1), 6
Forests Ordinance 2015 (Cap 74)
Land Code (Cap 81)
Limitation Ordinance (Cap 49)
Public Authorities Protection Act 1948 s 2
Rajah's Order IX of 1875
Rules of the High Court 1980 O 14A, O 18 r 19

**Appeal from:** Civil No Q-01–122–03 of 2012 (Court of Appeal, Putrajaya)

*Leong Hsin Ru (Tang & Partners Advocates) in Civil Appeal No 01–28–04 of 2015(Q) for the appellant.*
*Sim Boon Hui (Kadir, Wong, Lin & Co Advocates) in Civil Appeal No 01–38–06 of 2015(Q) for the appellant.*
*JC Fong (Saferi Ali and Dayang Farzila with him) (State Attorney, Sarawak State Attorney General's Chambers) in Civil Appeal No 01–29–04 of 2015(Q) for the appellant.*
*Sim Hui Chuang (Lim Lip Sze with her) (Reddi & Co Advocates) in Civil Appeal No 01–39–06 of 2015(Q) for the appellant.*
*Keith Chin Hsiun (Yong, Wong & Chin Advocates) in Civil Appeal No 01–43–06 of 2015(Q) for the appellant.*
*Baru Bian (Joshua Baru with him) (Baru Bian & Co Advocates) for the respondents.*

**Balia Yusof FCJ:**

INTRODUCTION

**[1]** These five appeals arise from a claim made by the respondents representing the Kelabits, the Penans and the Lun Bawangs who are natives of Sarawak. The respondents are the six plaintiffs in the court below. As natives they claim to have acquired and/or inherited customary rights over the areas of land from time immemorial. They sued the appellants on behalf of themselves and the three native groups named above.

**[2]** The appellant in Appeal No 01–39–06 of 2015(Q), Ravenscourt Sdn Bhd, was the first defendant in the High Court, while Billion Venture Sdn Bhd the appellant in Appeal No 01–43–06 of 2016(Q), was the second defendant. The third defendant was Limba Jaya Timber Sdn Bhd, the appellant in Appeal No 01–28–04 of 2015(Q). The fourth defendant was Kubang Sri Jaya Sdn Bhd, the appellant in Appeal No 01–38–04 of 2015(Q). The appellants in Appeal No 01–29–04 of 2015(Q), the Director of Forest Sarawak and State Government of Sarawak were the fifth and sixth defendants respectively in the High Court.

**[3]** These five appeals were heard together on a common question of law to be determined by this court upon leave being given to the appellants on 9 March 2015.

**[4]** For ease of reference, the parties herein will be referred to as they were in the High Court.

THE PLAINTIFFS' CLAIM

**[5]** This is a derivative action filed by the first and second plaintiffs on behalf of the Kelabits, by the third and fourth plaintiffs on behalf of the Penans and by the fifth and sixth plaintiffs on behalf of the Lun Bawangs of Long Napir and Kampung Bahagia, all of whom claimed to have originated from Abpa/Fa Meriit, Fa Rupu Abpa/Fa Adang, Ba Peresek, Ba Nyakit, Long Gita, Long Adang, Long Sulung, Long Raya, Long Tevenga, Long Sebayang, Long Keneng and Long Tegan in the Upper Limbang River and who claimed that as natives of Sarawak, they have acquired and/or inherited native customary rights ('NCR') over certain areas of lands since time immemorial. The areas of lands claimed by them collectively are shown in a map annexed to the statement of claim. The plaintiffs however did not specify the areas or the size of the NCR lands claimed by them.

**[6]** The first defendant is the holder of a timber licence No T/0294 which was issued by the fifth defendant on 28 January 1985. The second defendant is the holder of a planted forest licence No LPF/0027 issued on 22 February 2002. The third defendant is the holder of a planted forest licence No LPF/0038 issued on 6 December 2004 while the fourth defendant is the holder of a timber licence No T/9090 issued on 2 December 2002. The plaintiffs claimed that pursuant to the licences, the defendants entered, encroached and trespassed into their NCR lands to cut and harvest timbers and to maintain planted forests for merchantable timbers. They claimed that the areas covered by the licences overlap with their NCR lands, are subject to their NCR lands and that the defendants have not conducted any ground survey to identify the boundary of and exclude the NCR lands from the licenced areas.

**[7]** The plaintiffs contended that the grant and issuance of the licences by the fifth and sixth defendants under the Forests Ordinance 2015 was unconstitutional and wrongful in so far as they abridged and impaired the plaintiffs' rights to their NCR lands. The plaintiffs pleaded that their NCR rights have not been extinguished and that they have not been compensated in accordance to the provisions of the Land Code when their NCR lands were licenced or alienated to the defendants.

**[8]** The plaintiffs seek for various declaratory orders in respect of their rights to the NCR lands as well as for damages both general and aggravated and/or exemplary damages.

PROCEEDINGS IN THE HIGH COURT

**[9]** Before the High Court, five applications were filed by the defendants, each by the first, second, third and fourth defendants, while the fifth and sixth defendants filed their application together to strike out the plaintiffs' suit under O 14A of the Rules of the High Court 1980 and alternatively under O 18 r 19 of the same. The defendants contended that the plaintiffs' challenge against the issuance of the licences by the Director of Forests Sarawak ('the fifth defendant') to the first to fourth defendants ought to have been made by way of judicial review and not by way of a writ action. It was further contended that the plaintiffs' claim were barred by the Limitation Ordinance and the Public Authorities Protection Act 1948.

**[10]** The defendants submitted that the issues before the court are suitable for determination on a question of law without a full trial of the action which will save time and cost. It was further contended that the plaintiffs' action is scandalous, frivolous and an abuse of the court process and ought to be struck out.

**[11]** The plaintiffs chose not to file any affidavit in reply to the applications on the ground that the issues raised are issues of law and not of facts for determination by the court.

**[12]** The learned judicial commissioner ('JC') at the conclusion of the hearing of the applications held that the plaintiffs' claim should be made by way of judicial review application and not by way of writ action and allowed the defendants' application to strike out the plaintiffs' suit.

**[13]** In allowing the defendants' application, the learned JC made certain findings on the facts relating to the case as set out in the following paragraph of his judgment:

> 35. Further, from para 1(b) of the statement of claim, the plaintiffs have pleaded that they are now residing at Long Napir and Kampung Bahagia, Limbang and have resided there since the 1960s and the 1970s. This is confirmed in paras 9, 10 and 11 of the statement of claim. The plaintiffs did not plead nor set out the distance between Long Napir and Kampung Bahagia from the NCR lands claimed by them, whether and how often they visited the lands. The plaintiffs did not plead that they continue to posses, plant and maintain the NCR lands or that they continue to visit their NCR lands. The basis of a claim for NCR is their continuous occupation of land: *Sapiah binti Mahmud (F) v Superintendent of Lands and Surveys, Samarahan*

*Division & 2 Ors* [2009] MLJU 410; [2009] 9 CLJ 567. It is apparent that since the 1960s and 1970s they had migrated and settled at Long Napir and Kampung Bahagia in Limbang and are no longer residing nor in possession of the NCR lands which they claimed to have inherited from their ancestors. Under native customs, the plaintiffs have abandoned their NCR lands or their claims to the NCR lands: *Nyalong v The Superintendent of Lands & Surveys 2nd Division, Simanggang* [1967] 2 MLJ 249; [1971] 1 LNS 116.

**[14]** On the issue of limitation, the learned JC had opined the following:

> 31. The next question posed for the determination of the court is whether the plaintiffs' action is caught by s 2 of the Public Authorities Protection Act. Under s 2(a) of this Act, any action or proceeding taken to challenge any act done by public officers pursuant to any written law or in the execution of their public duty shall not lie or be instituted unless it is commenced within 36 months next after the act complained of.
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> 32. In this case, the complaint of the plaintiffs was the issue of the license to the first to fourth defendants by the fifth defendant who is a public officer exercising his duties under the Forest Ordinance which the plaintiffs averred have impaired their rights to their NCR lands. The license was issued on 28 January 1985 to the first defendant and to the second and third defendants on 22 February 2004 and 12 June 2004 respectively. The defendants submitted that this action, being filed in 2011, is well outside the 36 month period mandated by the Act and is therefore not competent to challenge the licenses issued to the first, second and third defendants by the fifth defendant.
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> 33. Since the licenses were issued, the first defendant has been carrying out logging in the areas under the timber license and the second and third defendants have been carrying out works under their respective planted forest license. The plaintiffs claimed the areas as their NCR lands. In that case, they knew or should know of the logging and tree plantation activities carried out by the defendants in the areas. The first defendant in para 4 of its affidavit has affirmed that the plaintiffs have for more than 26 years known and been aware of such timber operations and activities of the first defendant. The plaintiffs did not file any affidavit to deny this. If they claimed that the issuance of the licenses and the logging activities have impaired their rights to their NCR lands, then they should have taken actions or took steps to commence proceedings against the defendants as soon as possible notwithstanding the fact that they might not know the exact date when the licenses were issued.

**[15]** Aggrieved by the decision of the High Court, the plaintiffs lodged an appeal to the Court of Appeal.

## PROCEEDINGS IN THE COURT OF APPEAL

**[16]** Before the Court of Appeal, the two issues raised by the plaintiffs were:

(a) whether the plaintiffs' claim should be by way of judicial review and not by way of writ action and by filing the writ action, the plaintiffs had abused the court process; and

(b) whether there was a delay on the part of the plaintiffs in commencing the action and there was no explanation by the plaintiffs for the delay.

**[17]** On the first issue, at para 11 of the Court of Appeal's judgment, it was observed that:

> 11. Learned counsel for the respondent did agree that what was at stake in cases seeking enforcement of native customary rights are preponderance of private rights as opposed to public rights. We are pleasantly encouraged that after *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794 contest upon this ground of appeal was abandoned by the respondents.

**[18]** In *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794 the Court of Appeal had held that the plaintiff therein was right in filing an action by way of writ and not by way of judicial review.

**[19]** Earlier, at para 9 of the same, the Court of Appeal had opined:

> [9] Native customary rights claims are cases of a dispute between the private individual claiming a public law right and the public authority that refuses to recognise his right to it. The private individual is seeking not to nullify or challenge the public law on native rights but his case is about establishing the facts upon which he bases his claim to the particular native customary right claimed, and the defence on 16 May 2011 by the fifth and sixth respondents was to put the appellants on the factual parts of their claim to strict proof. The other respondents, being the various licensees, did similarly.

**[20]** The Court of Appeal found that there were issues of fact and of law that requires a full appreciation of the facts in order to make a judicial decision that is fair and just according to law.

**[21]** On the issue of limitation, the Court of Appeal was of the view that it is inherent on the applicability of s 2 of the Public Authorities Protection Act 1948 that it involves adducing evidence and therefore inevitably requires a trial. The court further held that in merely assuming there was a delay and on the basis there was no explanation for such delay, the learned JC had erred in dismissing the plaintiffs' writ summarily.

**[22]** In the upshot, the plaintiffs' appeal was allowed and the case was remitted to the High Court for determination of the writ action. The defendants in turn filed an application for leave to appeal to this court.

## THE QUESTION OF LAW AND SUBMISSION OF PARTIES

**[23]** Leave was granted on the following two questions of law:

(1) Whether natives of Sarawak, who have been re-settled, can proceed with a claim based on violation of their constitutional rights to land, property or livelihood:

(i) In respect of land in their previous settlement which they no longer possess or have, according to native customary law, been abandoned by them;

(ii) If the answer to (i) is in the affirmative, whether legal action in pursuit of such a claim may be defeated if the same is commenced outside the limitation period prescribed by the Public Authorities Protection Act 1948 or the Sarawak Limitation Ordinance or unexplained undue delay.

(2) Whether the Court of Appeal in this case ought to have followed its earlier decision of *Litus Jau & Ors v Bousted Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794; [2014] 1 CLJ 880 ('*Litus Jau* case') which ruled that section 2 of the PAPA and item 96 of the Sarawak Limitation Ordinance operate as to bar a claim for native customary rights over land and the infringement of such rights if such a claim is filed outside the period of limitation prescribed by the said statutes.

**[24]** In mounting the fifth and sixth defendants' appeal, learned counsel for the same submitted that in concluding 'like all other NCR claims, this case involved disputed facts and that the plaintiffs should not be denied the right to be heard in a court of justice to establish facts', the Court of Appeal had failed to consider and had totally disregarded the fact that the learned JC at the High Court had found that based on the pleadings and the evidence before him, there was no dispute as to the facts.

**[25]** The undisputed fact is that the plaintiffs had been resettled and had resided in their present location since the 1960's and 1970's. There was no evidence adduced and neither was it pleaded in their statement of claim that they were in possession or occupation of their land in their former settlement. As such the plaintiffs would have lost whatever NCR they have over their former settlement.

**[26]** This was the finding of fact arrived at by the learned JC which we have earlier referred to at para 13 of this judgment.

**[27]** It was further submitted that the plaintiffs had at the hearing of the O 14A application chosen not to file any affidavit in reply on the ground that the issues raised are solely issues of law and not of facts, meaning that whatever

facts laid before the court are not disputed.

**[28]** Again, it was pointed out to us that in their appeal to the Court of Appeal, the plaintiffs did not challenge the above findings by the learned JC. To this end, learned counsel for the fifth and sixth defendants referred to the plaintiffs' submissions in the Court of Appeal reasserting the fact that the plaintiffs had been resettled:

> The Appellants are Kelabits, Penans and Lun Bawangs by race and therefore the natives of Sarawak. In the Statement of Claim, the Plaintiffs claimed that the Kelabit and Penan Plaintiffs were resettled in their present settlement in Long Napir and Kampung Bahagia, Limbang in the 1960s or 1970s by the Government of Sarawak from their original settlements in Abpa/Fa Meriit, Ba Peresek, Ba Nyakit, Long Gita, Long Adang, Long Sulung, Long Raya, Long Tevenga (Ba Meli'it), Long Sebayang,Long Keneng and Long Tegan, Upper Limbang, Sarawak. Whereas the Lun Bawang Plaintiffs were from Abpa or FaAdang (Adang Rayeh and Adang Sut) in the Adang Valley, Upper Limbang before their migration to Long Kerabangan in Trusan, Lawas during the Japanese occupation in the Second World War.

**[29]** On the issue of limitation, it was submitted by the defendants that there was an unexplained delay by the plaintiffs in taking steps to bring their claims against the defendants, a fact which was never denied by the plaintiffs. All material facts stated by the defendants in their affidavits in support of their application were never challenged. The plaintiffs did not file any affidavit in reply.

**[30]** In response to the submissions of the defendants, learned counsel for the plaintiffs submitted that the learned JC had erred in his finding with regard to the issue of abandonment by the plaintiffs of their NCR land. It was further contended that the learned JC had misinterpreted the pleadings in arriving at the above conclusion. References were made to paras 8, 13, 14, 15 and 18 of the statement of claim to show that the plaintiffs are in possession of the land and so were paras 25.1 and 25.2 of the same. In short, it was an erroneous finding of fact. Whether or not there was abandonment is a question of fact which must be determined by way of a full trial and not summarily.

**[31]** On the issue of limitation, reliance was placed on the decision of the Federal Court in *Director of Forests, Sarawak & Anor v Balare Jabu & Ors and another appeal* [2012] MLJU 1758; [2012] 7 CLJ 685 which learned counsel said can be readily distinguished from the case of *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794; [2014] 1 CLJ 880.

A DECISION OF THIS COURT

**[32]** At the outset, it must be reiterated that whether the action in the instant case ought to be by way of a writ or judicial review is a non-issue before this court. This has been clearly stated by the Court of Appeal at para 11 of its judgment indicating the defendants' withdrawal of their appeals on this ground. We have reproduced the aforesaid paragraph in the earlier part of this judgment wherein it was conceded that following *Litus Jau*, the plaintiffs' action by way of writ action is right.

**[33]** The hearing before the learned JC was by way of an O 14A and/or O 18 r 19 application. There is no dearth of authorities on the applicability and suitability of this order. The order enables the court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein (see *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8).

**[34]** Order 14A of the Rules of the High Court 1980 reads:

> 1(1) The Court may, upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) On such determination the Court may dismiss the cause matter or make such order or judgment as it thinks just.
>
> (3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.
>
> (4) The jurisdiction of the Court under this Order may be exercised by a Registrar.
>
> (5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.
>
> 2 Manner in which applications under rule 1 may be made (O 14A r 2)
>
> An application under rule 1 may be made by a notice of application or, notwithstanding Order 32, rule 1, may be made orally in the course of any interlocutory application to the Court.

**[35]** On the applicability and the approach to be taken by the court in exercising its powers and discretion under O 14A, we refer to the commentary on O 14A appearing in the *Malaysian Court Practice (Practitioner Edition)*, a

publication of the Malayan Law Journal at pp 125–127 which reads as follows:

> [14A.1.3.] Suitable question of law or construction
>
> The question of law or construction must be suitable to be determined without the full trial of the action. The test of whether the question of law or construction is 'suitable' to be determined under this order is *whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question.* The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. For example see *Manganmal Jhamatmal Lalwani v NE Vickerama* [2001] 1 SLR 90 (where the plaintiff made an application for a ruling on the preliminary issue as to whether there was an issue estoppel).
>
> In cases where all the relevant evidence is before the court, and where the point of law depends entirely on the construction of relevant documents in their context and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under O 14A rather than to allow it to go for trial. See *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at p 521 (CA) (construction of letter of credit). For the law as to construction, see *Prenn v Simmonds* [1971] 3 All ER 237.
>
> The question of law or construction to be determined by the court under this order should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity, still less any ambiguity or fictitious facts, about what is the question that has to be determined: *Allen v Gulf Oil Refining Ltd* [1979] 3 All ER 353. There must be no hypothetical or future facts: *Summer v William Henderson & Sons Ltd* [1963] 2 All ER 712 (CA) (no facts were agreed and what the outcome of the evidence was most uncertain). Where the issues of fact are interwoven with the legal issues raised, it will be undesirable for the court to split the legal and factual determination, for to do so would in effect be to give legal rulings in vacuo or on a hypothetical ruling, which the court will not do (see *State Bank of India v Marjani Marketing*, 1 March 1991, CA Transcript No 9/0304).
>
> *The issue of law, if it is discernible at all, has to be discernible from the statement of claim and defence.* If there could still be a debate as to whether on slightly different facts a cause of action might or might not exist, an application under O 14A is inappropriate. The court should not be required to interpret the statement of claim to decide what point of law arises. An application under O 14A is to decide clear points of law or construction apparent on the pleadings (see *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* [1998] EWCA 3245, 22 July 1998, CA). (Emphasis added.)

**[36]** Zulkefli Ahmad Makinuddin JCA (as he then was) in his dissenting judgment in the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812 at p 827 had stated the following:

> It is trite law that, for the court to exercise its power to summarily dispose off an action under O 14A of the RHC, there should not be any dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings, concludes

that the material facts are not in dispute (see the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8). In this case it is noted that from the affidavits filed by the defendant in opposing the plaintiff's O 14A application, it is clearly shown that there is a serious dispute as to the material facts vis a vis the date of delivery of vacant possession of the said school to the defendant.

**[37]** Earlier at p 826 of the report His Lordship had opined:

I am also of the view that O 14A of the RHC is not a vehicle for which the court is required to interpret the statement of claim to decide what point of law arises before deciding on it. An application under O 14A of the RHC is to decide clear points of law or construction that are apparent on the pleadings. It is to be noted in this case the learned judicial commissioner proceeded to hear the plaintiff's O 14A application without the benefit of the defendant's defence which had yet to be filed at that time of the hearing of the application. Instead, the learned judicial commissioner thought it fit to choose to only confine himself to the averments made by the plaintiff in its statement of claim. The learned judicial commissioner has failed to sufficiently identify the relevant issues arising from the action, which necessarily ought to include the defendant's defence to the action. Therefore, the learned judicial commissioner was not in any position to make the said order that he did, ie, that the plaintiff's action against the defendant was suitable for determination under O 14A of the RHC. On this point I would like to refer to the case of *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* EWCA, 22 July 2998 wherein the Court of Appeal therein stated, inter alia, as follows:

> With the benefit of hindsight it is possible to see that this is where things began to go wrong. In fact the particulars would not be relevant to the O 14A application either so far as the plaintiffs were concerned or so far as the defendants were concerned. The issue of law, if it was discernible at all, had to be discernible from the statement of claim and the defence. The judge himself ruled at the outset of the hearing of the O 14A application on 17 October 1994 that he should not adjourn that hearing as he was requested to do by the plaintiffs' counsel on the basis that particulars were about to be delivered 'since it is not the function of particulars to take the place of necessary averments in the pleading.

**[38]** The views expressed by His Lordship Zulkefli Ahmad Makinuddin JCA (as he then was) had earlier been expressed by another Court of Appeal in the oft quoted case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 where the court observed that:

> ... In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the *material facts pleaded which are obviously* undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found. (Emphasis added.)

**[39]** The said court also observed at p 28 of the report:

> ... what ought to have been done by the learned judge, not as a matter of choice but in the exercise of discretion, is, at the outset, *to scrutinise the pleadings to discover what material facts are not obviously in dispute*, what facts the parties may agree after discussion and submission, with variation or otherwise and as the last resort to compel either party or both to accept the material facts, which the court thinks obviously should not be disputed. In our view, the last recourse, though drastic, is proper and permissible. (Emphasis added.)

**[40]** The salient facts in *Dream Property* as gathered from the reports may be stated as follows:

> The plaintiff filed an action against the defendant claiming, inter alia: (1) a declaration that vacant possession of the property had been delivered by the plaintiff to the defendant on a certain date; and (2) a declaration that the defendant had failed to pay to the plaintiff the balance purchase price and the interest. The plaintiff thereafter filed an application under O 14A of the Rules of the High Court 1980. The defendant opposed the plaintiff's O 14A application, inter alia, on the ground that there was a dispute as to the material facts which was evident from the parties' affidavits and therefore the action was not suitable to be determined under O 14A of the RHC. It was also the defendant's contention that the plaintiff's O 14A application had failed to satisfy the prerequisites of O 14A of the RHC for the action to be determined under the order. The learned judicial commissioner decided that the issue on the date of delivery of vacant possession of the property was suitable to be determined under O 14A of the RHC, and proceeded to allow the plaintiff's O 14A application. The defendant appealed.
>
> By a majority decision, the Court of Appeal dismissed the defendant's appeal with regard to the O 14A application. Zulkefli Ahmad Makinuddin JCA (as he then was) gave a dissenting judgment. Leave was granted by the Federal Court to the defendant to appeal against the decision of the Court of Appeal. The Federal Court set aside the majority decision of the Court of Appeal as well as the orders made by the High Court in the O 14A application. The Federal Court ordered the matter to be remitted to the High Court for a full trial.

**[41]** Reference may also be made to the case of *Watson and anor v Dutton Forshaw Motor Group Ltd and ors* [1998] Lexis Citation 4282; [1998] EWCA 3245, 22 July 1998 (CA) which supports the view that an application under O 14A is to decide clear points of law or construction apparent on the pleadings. It was referred to by the Court of Appeal in the *Dream Property Sdn Bhd* case.

**[42]** On the strength of the authorities cited, it is apparent that one primary task which must be undertaken by the court in deciding on the suitability and applicability of the order is to consider whether the pleadings disclose any dispute on the material facts. The order shall only apply where the material facts pleaded are obviously undisputed or which should not have been disputed.

**[43]** 'Pleadings' as defined in the Rules of the High Court 1980 simply means 'it does not include a petition, summons or preliminary act'. Thus, pleadings must cover a wide range of cause papers. The only cause papers available in our instant case are the statement of claim, the defence, reply and the affidavits in support of the O 14A applications.

**[44]** The question posed to this court relates to the issue of whether there was an abandonment by the plaintiffs of their so called customary rights to the land. The learned JC had found there was such an abandonment. This finding was made as a finding of facts as gathered from the pleadings filed in the action. Was there any basis for such a finding?

**[45]** We have earlier reproduced para 35 of the learned JC's grounds of judgment at para 13 of this judgment and we do not wish to repeat the same. Suffice it to say that upon his perusal of the pleadings, the learned JC had found as a fact that the Kelabit and Penan plaintiffs are now residing at Long Napir and Kampung Bahagia, Limbang and had resided there since the 1960's and 1970's, while the Lun Bawang plaintiffs had migrated from their former settlements during the Japanese occupation in the second World War. This is clearly evident from paras 1(b) and (c) of the statement of claim.

**[46]** For a better appreciation of those facts, we are constrained to reproduce the relevant parts of para 1 of the statement of claim which read as follows:

> (b) The Kelabit and Penan Plaintiffs were resettled in their present settlement in Long Napir and Kampung Bahagia, Limbng in circa, the 1960s or 1970s by the Government of Sarawak from their original settlements in Abpa/Fa Meriit, Ba Peresek, Ba Nyakit, Long Gita, Long Adang, Long Sulung, Long Raya, Long Tevenga (Ba Meli'it), Long Sebayang, Long Keneng and Long-Tegan, Upper Limbang, Sarawak.
>
> (c) The Lun Bawang Plaintiffs were from Abpa or Fa Adang (Adang Rayeh and Adang Sut) in the Adang vallery, Upper Limbang before their migration to Long Kerabangan in the Trusan, Lawas during the Japanese Occupation in the Second World War.

**[47]** We wish to further add and make reference to paras 9, 10 and 11 of the statement of claim, in which it was pleaded:

> 9. The Kelabit Plaintiffs are Meriit Kelabits and are of origin in the Belait in Brunei before their migration into Limbang. Due to harassment by Brunei overlords, the Plaintiffs' ancestors migrated to the Upper Limbang and settled at Fa Selidong. The settlement at Fa Selidong was destroyed by hailstorm and the Plaintiffs' ancestors fled to Bukit Ubung near Batu Buda. The hailstorm causes a rock formation known as Batu Mek. Another hailstorm destroyed their longhouses at Bukit Ubung. From Bukit Ubung, the Plaintiffs' ancestors migrated to Fa Melinau, Upper Baram. The Plaintiffs' ancestors then moved to Fa Depur in the Bario Highlands. Due to

warring threat from the Kayans, they moved to Fa Lutut in Long Bawan area, Indonesia. From there they returned to live below Mount Murud and surrounding Batu Lawi. From there they slowly moved to Fa Ribad, Fa Bur, Fa Rupu, and to the Adang. In circa, the 19th Century, a deadly plague struck the Adang and the Plaintiffs' ancestors almost perished except for a few groups who fled the Adang to the Meriit Watershed in Upper Limbang. Since then, they lived in the Meriit until they were relocated to Long Napir, Upper Limbang circa the 1960s or the 1970s. During the Japanese Occupation in the Second World War, the Plaintiffs left their longhouses and were forced to live in the forests. After the Second World War, the Plaintiffs' ancestors returned to their longhouses in the Meriit. The chieftains of the Meriit Kelabits were Pun Bala Tana (whose son Pun Pitan later became the first Penghulu of the Meriit Kelabit) and the assistant Penghulu, Pun Uri, was the Ketua Kampong; Pun So; Pun Pelima; Pun Ribut; Pun Bawang; Pun Sunuk; Pun Adap; Tama Usun.

10. The Penan Plaintiffs are the inhabitants of the Brunei River, the alternate name for the Limbang River, and is closely related to the history of the Penans in the Sungai Magoh area. Their ancestors have lived there since about 200 years ago. In the Upper Limbang area, the Penan Bruneis continued their nomadic lifestyle until the late 20th Century. Prior to the migration, the Plaintiffs' ancestors were roaming the watersheds of Ba Brunei, Ba Magoh, Ba Teresak and Ba Kubaan. The first leader of the Plaintiffs was Penghulu Ta'ang. Leki Rigung, the present Penghulu/Tua Kaum is the grandson of Anu Ta'ang, the eldest son of Penghulu Ta'ang and who succeeded We Salau as Penghulu in circa, the 1970s. Leju Rigung led the Penan Bruneis from the forests of Upper Limbang to the present settlement at Kampung Bahagia in circa, the 1970s. The Penan Brunei settlements of Upper Limbang consist of Long Gita, Long Adang, Long Sulung, Ba Nyakit, Long Keneng, Ba Peresek, Long Sebayang, Long Raya, Long Tevenga (Ba Meli'it) and Long Tegan.

11. The Lun Bawang Plaintiffs are known as Lun Abpa of Fa Adang and are of the same race of people and shared the same origins as the Meriit Kelabits before the separation in consequence of a deadly plague in circa, the 19th Century. The Lun Fa Adangs and the Meriits Kelabits have resided in the Adang valley since before the occasion of the plague. During the plague, the Plaintiffs' ancestors almost perished except for few group who fled the Adang into Semadoh in Upper Trusan and returned more than a decade later to resettle at Long Sier. The headman of the Lun Fa Adang at that time was Pun Ngawal, the father of Udan Balang. In the Adang, they farmed on lands in the sub- tributaries of Fa Telayun, Fa Adang Sut, Fa Terubu, Fa Alep, Far Mur, Fa Tebuso, Far Sier and into the outreaches of the Adang, until Ruan Adang on the border with Upper Trusan. Batu Danabai, a rock formation that resembles a Lun Fa Adang folklore, is in existence in Fa Sier, today. During the Japanese Occupation in the Second World War, the headman, Racha Umong led the Lun Fa Adangs to flee Long Sier in order to protect themselves from the advancing Japanese. They resettled at Long Kerabangan in Upper Trusan, to the present day.

**[48]** We are constrained to say that the above said three paragraphs are merely a reiteration of the plaintiffs' averment of the facts about their resettlement and abandonment of their NCR lands. We are further of the view

that they are but a statement of historical facts regarding their forefathers. It bears no assertion that they are still in occupation or possession of their original NCR lands.

**[49]** Mathematically speaking, taking the plaintiffs' case against the first defendant as an illustration, the pleadings clearly show that for the Kelabit plaintiffs, they were relocated circa the 1960's and 1970's meaning that they had left their land some 15–25 years before the issuance of the timber licence to the first defendant in 1985 or some 41–51 years before they filed their claim against the defendants in March 2011. In the case of the Penan plaintiffs, they resettled in their present settlement circa 1970's meaning that they had left their settlement some 15 years before the issuance of the timber licence and some 41 years before they filed their claim. For the Lun Bawang plaintiffs they resettled at Long Kerabayan in the Upper Trusan during the Japanese occupation in the Second World War. This goes to show that they had left their land about 40 years before the issuance of the timber licence or some 66 years before their claims were filed against the first defendant. The timber licences for the second and fourth defendants were issued in 2002 while the third defendant was given the licence in 2004.

**[50]** The above averments of the plaintiffs led to the finding of the learned JC that they had left their ancestral lands and had been resettled elsewhere. They have been displaced from their former settlements. They are no longer residing or in possession of the NCR lands which they claim to have inherited from their forefathers. These are the plaintiffs' own averments and the defendants never dispute it. In the court's view, this was an undisputed fact. This finding of fact made by the learned JC was also not challenged by the plaintiffs when they filed an appeal to the Court of Appeal against his decision.

**[51]** The defendants in their affidavits in support of the application under O 14A disclose that the timber licences were issued to them in 1985 for the first defendant and in 2002 and 2004 for the second and third defendants respectively. Ever since the issuance of the said licences, logging of timber had been carried out in the NCR land claimed by the plaintiffs and the plaintiffs had not taken any action against the defendants for the encroachment of their native lands. The plaintiffs must have known or aware of the defendants' timber operation and activities on their land and yet choose not to do anything about it until the filing of the suit in 2011. Indeed, the first defendant had averred in para 4 of its affidavit in support of its O 14A application that the plaintiffs have for more than 26 years known and have been aware of such timber operations and activities of the first defendant. This was never denied by the plaintiffs. The plaintiffs did not file any affidavit in reply to challenge the said averments of the first defendant. Likewise, the second and third

defendants too had asserted in their affidavit in support of the application of the tree plantation under their respective planted forest licences issued in 2002 and 2004.

**[52]** The learned JC had, in our view, rightly decided on the issue of law raised as apparent from the undisputed material facts in the pleadings. He had done what the Court of Appeal in the *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu case* observed as 'to scrutinise the pleadings as to discover what material facts are not obviously in dispute' in exercising his powers and discretion under the aforesaid O 14A application.

**[53]** It was the finding of the learned JC that the plaintiffs had abandoned their NCR lands or their claims to the NCR lands. Paragraphs 1(b) and (c) read together with paras 9, 10 and 11 of the plaintiffs' statement of claim which we have produced *in extenso* at resettlement, the plaintiffs did not plead they continue to possess, plant and maintain their NCR lands or whether they continue to forage on their lands. It is not even known and neither was it pleaded whether they have ever visited their lands ever since their resettlement in Long Napir and Kampung Bahagia for the Kelabit and Penan plaintiffs and to Long Kerabangan in the Tusan, Lawas for the Lun Bawang plaintiffs.

**[54]** In *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555, the Court of Appeal observed:

> From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. We note that even Mr Baru in his submission hinged the claim of the respondents over the disputed area on the assertion that they 'had been in continuous occupation and by express provisions of the law at the relevant time, been lawfully occupying the disputed area'. It is thus a matter of evidence adduced whether his submission can be sustained.

**[55]** The court, at p 272 (MLJ); p 571 (CLJ) further opined that:

> The approach adopted by our courts is consistent with the views expressed by some of the courts in other jurisdictions. In *Mabo (No 2)* [1992] 175 CLR 1 it was accepted that the 'Meriam people were in *occupation* of the Murray Island for generations before the first European contact'. And in *R v Van der Peet* [1996] 2 SCR 507, 137 DLR (4th) 289 Lamer CJ opined that both 'aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying the land as their forefathers had done for centuries'. (See also: *Western*

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*Australia v Ward*; *Attorney-General (NT) v Ward*; *Ningarmara v Northern Territory* [2002] HCA 28; *Calder v A-G (British Columbia)* [1973] SCR 313; 34 DLR; *Johnson v M'lntosh* 21 US (8 Wheat) 543 (1823) and *Worcester v State of Gerogia* 31 US (6 Pet) 515 (1832). (Emphasis added.)

B

**[56]** The two cases referred to by the Court of Appeal in *Nor Anak Nyawai* case are *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543. Continuous and unbroken occupation of the land form the basic feature of a claim to such right. *Adong Kuwau* is a decision of the

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Court of Appeal affirming the views of the High Court and on appeal to the Federal Court, the decision of the High Court and Court of Appeal were affirmed. But no reasoned judgment was given. *Sagong Tasi* is another decision of the Court of Appeal. The Court of Appeal therein followed the decision in *Adong Kuwau.*

D

**[57]** Such proposition had also been earlier established in *Keteng bin Haji Li v Tua Kampong Suhaili* [1951] SCR 9 where Digby J had held that 'if a person abandons his legitimate occupation of such land, he does so at his peril'. So was

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the case of a native who had by his own free will allowed a non-native to use the land as in *Udin anak Lampon v Tuai Rumah Usom* [1949] SCR 3.

**[58]** Similarly, a claimant who had acquired inheritable rights over the same land for a period of twenty years and allowing without objection the user of

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others of the land was held to have abandoned any customary rights which he may have acquired either by himself or in any other manner over the land, as in the case of *Nyalong v The Superintendent of Lands & Surveys 2nd Division, Simanggang* [1967] 2 MLJ 249.

G

**[59]** Further reference may be made to the case of *Sapiah binti Mahmud (F) v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors* [2009] MLJU 410; [2009] 9 CLJ 567 which applied the principles laid down in *Nor Anak Nyawai* that a claim under the native customary rights to land is based on continuous occupation.

H

**[60]** The Rajah's Order IX of 1875 made specific reference to the common practice of the natives to make large clearings of old jungle and abandon them. In this respect, the order says:

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> Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them. I hereby direct that should any clearance of the kind be made in future, *the persons who cleared the ground allow the same to go uncared for, they will lose all claim or title to such land;* and should anyone be desirous of making gardens thereon, they will be permitted to become squatters; and notice is hereby given that should the original clearers try by any means to

molest any such squatter they will render themselves liable to be fined at the rate of $10 (ten dollars) per hundred fathoms square for all the land they may have cleared, they having destroyed useful jungle produce such as firewood, rattans & ... for no purpose. (Emphasis added.)

**[61]** In *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 this court had affirmed the views of the Court of Appeal that 'occupation' need not necessarily mean actual presence on the land. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering. The evidence before the court in the said case clearly established that the respondent therein continued to exercise control over the said land although he had ceased to live on the land even prior to the fire which gutted the house on the land in 1941.

**[62]** Two questions of law raised in *Madeli Salleh* are relevant for consideration in the instant appeal namely questions 1 and 5 which read as follows:

1. Whether rights of natives to occupy untitled land in accordance with customary laws could have subsisted or would have been lost or extinguished in the area reserved for the operations of the Sarawak Oilfields Limited pursuant to Order No XXIX 1921 made the Rajah.

5. Whether having regard to the provisions of s 3(1) and 6 of the Civil Law Act 1956 ('Act 67'), and the relevant Federal, State and customary laws in Malaysia, and particularly in Sarawak, which regulate the creation, exercise, loss, abandonment and extinguishment of native rights over land; the Court of Appeal in this instant case, and indeed, the courts in Malaysia generally, could rely on:

(a) *Adong Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1973] 3 CLJ 885; and

(b) *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769;

which were decisions based upon:

(i) the Australian case of *Mabo (No 2)* which is 'an authority for the proposition that the common law of Australia recognizes a form of native titles'; and

(ii) the Canadian case of *Calder v AV of British Columbia* which held that 'common law categorically recognized native rights over land'.

**[63]** We are particularly concerned with the issue of abandonment and extinguishment of native rights over land.

**[64]** The brief facts of the case as gathered from the report are as follows. The respondent (plaintiff in the court below), Salleh bin Kilong, brought an action seeking declarations, inter alia, that the respondent was at all material times a licencee under native customary rights of all that parcel of land situate at Miri/Pujut Road, measuring approximately 6.1 acres in area, and forming part of Lot 660 Block 8 Miri Concession Land District, ('the said land'); and that the act of the appellants (defendants in the court below) to declare the said land as a park and later develop it into a school constitutes a wrongful interference with the respondent's enjoyment of his native customary rights. Salleh bin Kilong had passed away before the appeal was heard by the Court of Appeal and had been substituted by his son, Madeli bin Salleh, who is also the administrator of his estate.

**[65]** The respondents' pleaded case is as follows: for many years prior to 1 January 1958, his father and later himself had acquired and exercised native customary rights over the said land by clearing, occupying and planting rubber trees and later fruit trees. Thus the respondent's claim is rooted on long and continuous occupation of the said land. The second appellant, by *gazette* notification dated 24 December 1982 declared the said land to be a government reserve for the purpose of a park and later it was developed into a school. The respondent alleged that the said act of the second appellant without prior extinguishment of the respondent's native customary rights and payment of compensation was wrong in law and constituted wrongful interference with his rights and enjoyment of the said land.

**[66]** Delivering the judgment of the court in answering the two questions together, Arifin Zakaria FCJ (as he then was) stated:

> Even though the respondent admitted that he left the said land before the house on the said land was gutted by fire in 1941, but he maintained that he returned to the said land regularly to attend to the fruit trees. He claimed, he did so, on a monthly basis. The respondent's testimony in this regard went unchallenged. This is further fortified by the evidence of PW3 the Jabatan Kerja Raya employee who visited the said land as late as 1975. He confirmed that there were fruit trees and rubber trees on the said land. The letter dated 26 March 1982 addressed to the first appellant from Temenggong Haji Munip bin Tabib, the Head of the Malay in Miri in support of the respondent's application for title to the said land confirmed that the respondent's father Kilong bin Dullah was in occupation of the said land before it came under Shell concession area.
>
> ... It is not in dispute that even though the said land came to be reserved for the operation of the Sarawak Oilfields it was never taken possession of by the Sarawak Oilfields for their purposes. The respondent continued to be in occupation of the said land until it was declared by gazette notification dated 24 December 1982 as land reserved for the purpose of a park, which was later developed into a school. In

the circumstances we are of the view that the reservation of the land under the 1921 Order does not have the effect of extinguishing the rights of the respondent over the said land.

**[67]** This court held that the respondent's right was never lost and agreed with the views expressed in *Adong bin Kuwau* and *Nor Anak Nyawai,* the two authorities which we had referred to earlier on this issue of abandonment and/or continuous occupation.

**[68]** In contrast to the position of *Madeli Salleh*, the plaintiffs in the instant appeal had clearly lost their rights to the land when the same was abandoned by their resettlement to other areas away from the claimed areas. Further, there is no evidence to suggest that they are still in continuous possession or occupation of the land. There is also no evidence to suggest that they ever return to the land after their resettlement and migration.

**[69]** In another decision of this court, *Bisi Ak Jinggot @ Hilarion Bisi Ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] MLJU 670; [2013] 6 CLJ 805, in a judgment delivered by Suriyadi Halim Omar FCJ, we have stated:

> We are satisfied that the creation of native customary land and rights acquired by a native of Sarawak, is conditional upon the adherence to custom or common practice of his community. For an Iban, it has the customary concept of *Tusun Tunggu* whereby NCR could be acquired by two modes namely clearing untitled virgin jungle enroute to the creation of what is locally described as *temuda* and the other by receiving the *temuda* as a gift or inheritance. For the first mode, the common thread is that the acquisition of NCR starts with clearance of the said untitled virgin land or jungle by a native, *followed by the occupation of the cleared land and thereafter not allowing the land to be abandoned. Once abandoned whatever NCR was created or acquired previously over that land would be lost. If the original owners abandons the land without more the community takes over.* (Emphasis added.)

**[70]** The concept of continuous occupation has always been recognised as an essential feature of native customary rights to land.

**[71]** The Sarawak Reports of the Land Committee 1962 which contains the Secretariat Circular No 12/1939 on native land tenure sets its objective as follows:

> 1. The Land Orders recognize native customary rights to land, but give little guidance on the subject; the law of customary tenure is wrapped up with that of inheritance and neither has yet been adequately codified. It is the aim of Government to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing lightly of their rights to others, whether alien or native. The following notes are the first step towards a better appreciation of the position and it is expected of every officer that he will study the

A subject and assist the Secretary for Native Affairs and the Superintendent of Lands and Surveys by suggestion and constructive criticism.

**[72]** On customary tenure, the circular provides in para 3 as follows:

B 3. All natives of Sarawak follow Indonesian adat to a greater or lesser degree and that adat, as regards the customary tenure of land, is briefly as follows:

(i) ...

(ii) ...

C (iii) ...

(iv) No community or individual may hold up land in excess of requirement and, the extreme case, removal to another district, automatically extinguishes all rights of user.

D

**[73]** This customary law/*adat* has been recorded in the customary concept of Tusun Tunggu, a code of the customs of the Iban and agreed upon by all Penghulus from the community at a conference held in Sibu on 15 July 1952 as follows:

E There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. *When a Dayak abandons his land 'temuda' and moves to another district he loses all his rights to it.* The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. F In such a case the original owner has no right to prevent from making use of the land and the user acquires the right. (Emphasis added.)

**[74]** This *adat* has consistently been upheld by the courts on the issue of abandonment of native customary lands.

G

**[75]** The issue of abandonment was never brought up by the defendants in their affidavit in support of the O 14A applications. Not a word has been said about the same. So was the argument put forth by the plaintiffs' learned counsel. It was further submitted that the plaintiffs had pleaded that they have H been in continuous occupation of their NCR lands despite being resettled since the 1960's and 1970's. Excerpts from paras 8, 13, 14, 15 and 18 of the statement of claim were referred to in the plaintiffs' written submission before us.

I

**[76]** We had a close look at those parags and having perused the same, we find that what had been averred are mere historical facts such as that is stated in para 15 which we quote: 'The Penan plaintiffs' ancestors lived in traditional dwelling huts called lamin toro and are semi nomadic in practice since about a

hundred years ago. The NCR lands is the source of livelihood and culture for the plaintiffs, without which they shall not be able to sustain their lifestyle or maintain their identity'. A

**[77]** Like what we have earlier observed about paras 9, 10 and 11 of the statement of claim, these averments are merely statements of historical facts regarding their ancestors. Again, as an example, at para 10 of the statement of claim it is declared that the ancestors of the Penan plaintiffs lived there since about 200 years ago and continued their nomadic life style until the late 20th Century. It relates nothing to the plaintiffs' assertion of occupation or possession of their NCR lands, be it actual or otherwise. B C

**[78]** In our view, these averments do not support the plaintiffs' contention that despite being resettled elsewhere, they still retain their NCR lands or are in continuous occupation of the same as alleged. The plaintiffs' averments about being resettled elsewhere since the 1960's and 1970's clearly goes to show the contrary. D

**[79]** Although abandonment of the plaintiffs' land was never stated in the defendants' affidavit in support of their O 14A applications, there were sufficient material facts established before the learned JC from the pleadings that goes to support his finding that there was abandonment by the plaintiffs of their NCR lands. That finding is not erroneous and was never challenged. E

**[80]** In the light of what have been stated above, we are inclined to agree with the defendants' submission and the findings made by the learned JC that there is 'non-user' and abandonment by the plaintiffs of their native land. No evidence have been adduced and neither was it pleaded that according to their customs, their rights to untitled land in their previous settlements continue to subsist notwithstanding the fact that they have been resettled in their present villages nearly 40 years prior to the filing of the suit against the defendants. F G

**[81]** On the facts before us, we agree that the plaintiffs no longer possess, plant or maintain their NCR lands in their previous settlements where logging activities by the defendants have been carried out for about 20 years before the commencement of the suit against the defendants. The uncontradicted evidence are inconsistent with 'occupation' as explained by this court in *Madeli Salleh*. H

**[82]** It is also inconceivable that the plaintiffs would not know of the presence of the defendants and their logging activities on the land for over a period of 26 years had they been in occupation of the land. At paras 33–34 of his grounds of judgment, the learned JC had admirably dealt with the issue which we find its unnecessary to repeat. I

**[83]** We agree that these are undisputed material facts which support the finding of loss of NCR over land in the previous settlements through non-user or abandonment having regard to the customary law and *adat* of the natives which are embodied or reflected from the decisions of the court, the Rajah's Ordinance IX of 1875 and the Secretariat Circular No 12/1939 in the Sarawak Report of the Land Committee 1962. We affirm the finding of facts made by the learned JC.

**[84]** The Court of Appeal had stated in its conclusion at para 27 of its judgment as follows:

> OUR CONCLUSION
>
> [27] The basis of summary jurisdiction was explained in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC). It is trite that no person should be shut out from access to justice. No claim should be struck out or dismissed or allowed on summary grounds under affidavit based procedures unless it is a plain and obvious case. This occurs only where the issue is purely a question of law or interpretation, and the facts based upon which the question of law or interpretation arose are not disputed. This is true also where the facts relevant to the question whether limitation applies are disputed. To deny any party the right to be heard in a court of justice to establish the facts and for a judgment made on the facts, is a denial of the fundamental elements of a fair and just decision. Courts must therefore be slow to do so.

**[85]** While it is right to state the law as such, the Court of Appeal had erred in concluding that 'there are issues of fact and of law that require a full appreciation of the facts in order to make a judicial decision that is fair and just according to law'. In other words, the Court of Appeal found that there are disputed material facts and/or insufficient facts that can justify the learned JC to conclude as he did.

**[86]** It is trite that an appellate court should always be slow to disturb findings of fact made by a trial judge, more so where such findings of fact were never challenged by the parties. Further, it has not been demonstrated in what manner the learned JC had erred in coming to his finding that merits appellate intervention. The undisputed facts found by the learned JC as disclosed from the pleadings must be upheld.

**[87]** For the reasons above stated, we answer question No 1(i) in the negative and with that, we find it unnecessary to answer the rest of the questions of law posed.

**[88]** In the result, these five appeals are allowed with cost. The decision of the Court of Appeal is set aside and the decision of the learned JC striking out the action is affirmed.

**[89]** Costs of RM10,000 is awarded to each of the appellants in Appeal Nos 01–28–04 of 2015(Q), 01–38–04 of 2015(Q), 01–39–06 of 2015(Q) and 01–43–06 of 2015(Q) subject to the payment of allocator. The appellants in Appeal No 01–29–04 of 2015(Q) ask for no cost and we make no order as such. Deposits to be refunded.

*Appeals allowed; decision of Court of Appeal set aside and decision of High Court to strike out respondents action affirmed.*

Reported by Ashok Kumar